IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER, MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN, DAVE TIGER and EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

Appeal from the Court of Appeals of the State of New York

SUPPLEMENTAL BRIEF OF THE STATE OF NEW YORK *AMICUS CURIAE*

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INDEX.

Case Cited.

Constitutional Provisions and Statutes.

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Statement

This supplemental brief is being filed upon the suggestion made at the oral argument by Mr. Justice Frankfurter, to consider a rule of the Board of Regents* which was discussed at the argument.

It had not been referred to in appellants' briefs.

* The Board of Regents is the body which has jurisdiction and supervision of the educational system in the State of New York, of the schools, institutions of higher education, and the professions (other than the legal profession). The Board at present has 13 members, the maximum permissible number, one chosen each year by the Legislature for a 13-year term. It must have at least 9 members. It has been in existence since 1784 (New York Constitution, Article XI, § 2; Education Law, Article 5).

Argument

The rule which was the subject of discussion (Rule 1) concerns the enforcement of Section 3021 of the Education Law and of Section 12-a of the Civil Service Law (see opening paragraph of the rule, R. 22). Section 12-a of the Civil Service Law is clearly constitutional under this Court's decisions in the *Gerende* and *Garner* cases, and is so conceded by appellants (Br. pp. 6-8, Reply Br. p. 1). As has been pointed out in our main brief, the validity of Section 3021 of the Education Law does not appear to be before the Court on this appeal. In any event, it is not a part of the operative provisions of the Feinberg Law and, as conceded by appellants (main brief p. 14), is separable from the other provisions of the Feinberg Law if for any reason it is found to be invalid, which, of course, we maintain is not the case. The only requirement of the rule in question in respect to the operative provisions of the Feinberg Law is that the school authorities shall inquire as to an employee's membership in organizations listed by the Board of Regents as advocating the overthrow of the government by force and violence.

The rule could have been adopted if the Feinberg Law had never been enacted, concerning as it does the enforcement of Section 3021 of the Education Law and Section 12-a of the Civil Service Law, which had been on the books since 1917 and 1939, respectively (our main brief pp. 4-5). To be sure, the Feinberg Law directs the Board of Regents to adopt rules for the enforcement of these statutory provisions, but it was the obligation of the Board of Regents to enforce them before the enactment of the Feinberg Law. As the Memorandum of the Commissioner of Education, which accompanied the issuance of the rules, stated (R. 25):

"Boards of education and school trustees have always been under obligation to provide such supervision of teachers and other employees as will insure sound teaching and a wholesome school environment. Chapter 360 of the Laws of 1949 (commonly referred to as the Feinberg Act) imposes on school authorities no new supervisory responsibility. The new legislation has the effect simply of directing attention to a special supervisory need * * * which the Legislature finds to be particularly acute at the present time, and of requiring the Board of Regents to prescribe procedures under which special attention will be given to this need."

The rule requiring the reports thus does not depend upon the Feinberg Law.

It is another, a separate specific rule, Rule 2 (R. 23-4), which was adopted to carry out the operative provisions of the Feinberg Law as to the listing of organizations and the *prima facie* evidence provision prescribed by subdivision 2 of Section 3022 of the statute.

It is not seen how any intimidating effect of the rule in question, designed as it is to carry into effect (1) a pre-existing concededly valid statute and (2) a pre-existing clearly separable one, can be urged as a ground for striking down the operative provisions of the Feinberg Law. It has no relation to those operative provisions which provide only for the listing, after appropriate notice and hearing, of organizations advocating the forcible overthrow of the government, and that continued (present) membership in an organization so listed, with knowledge of such listing, shall be *prima facie* evidence of disqualification. The rule would consequently seem to have no possible bearing on the question of the constitutionality of the law.

The argument appellants make against the rule is that the mere existence of a requirement for a regular report upon teachers has an unfortunate effect upon their morale. As was pointed out in the *Garner* case (in Mr. Justice Clark's opinion, 341 U. S. at p. 720, and in Mr. Justice Frankfurter's opinion, id. at p. 725), inquiry may be made by a state or municipality of its employees as to such matters. The existence of a law permitting such inquiry, such as the laws involved in the *Garner*, *Gerende*, and *American Communications* cases, would appear to have a far greater intimidatory effect than the Feinberg Law, with or without the rule providing for the reports.

Any misgivings as to the effect of the requirement for the reports (a matter which appears to rest in the realm of speculation as to the manner in which the rule would be administered, and is therefore not before the Court at this time) must vanish in the admonishments contained in the Memorandum of the Commissioner of Education on the administration of the rules (*supra*, R. 25). As to the reports of school officials, the Commissioner's Memorandum calls to the attention of the officials who will make the reports that they "will face a two-fold duty," viz: to eliminate the proscribed employees, but also (R. 26) that "it will be their responsibility so to conduct themselves and their inquiries as to protect and reassure teachers who are not subversive." The Commissioner's Memorandum further directs the school authorities to select with great care the officials who are to be entrusted with this duty, and specifically, that in districts employing fewer than eight teachers it would be advantageous to designate one of the trustees as the official or officials to make the required reports and in districts where there is only one trustee that he or she will pre-

sumably make all the reports. The Memorandum goes on to instruct the designated officials to "of course use their own acquaintance with the teachers for whom they are responsible as an immediate guide. If these officials are in fact well acquainted with the individual teachers on whom they are to report, they will already be in possession of sufficient facts either to substantiate their judgment of a teacher's loyalty or (in the case of teachers about whom they have some question) to indicate the need for further evidence" (R. 26).

In subsequent portions of this Memorandum (R. 27-28) are contained more cautionary directions which should dissipate any fears on the part of teachers as to any restrictive effect of the rule or the law except to accomplish the purpose the Legislature intended.

As has been said, the oath statutes upheld in the *Garner, Gerende,* and *American Communications* cases, would appear to produce a far more intimidatory effect, for they require the taking of an oath that one is not a member of an organization advocating the forcible overthrow of the government as a condition of public employment or the right to hold public office or office in a labor union. In those cases there was no provision for a finding by an appropriate agency, after hearing, that the organization did in fact advocate the overthrow of the government by force. The person affected was required to make oath that he did not belong to any organization which so advocates, and necessarily was required to be much more cautious in respect to the organizations which he joined than is a person seeking employment in the public school system of our State. Under the Feinberg Law, the teacher need be concerned only with the listed organizations.

Anent persons who in their youth, in seeking an answer to the problems of the depression of the 1930's, embraced doctrines or joined organizations which they later abandoned in disillusionment, it is to be noted that the Feinberg Law gives full protection to such individuals by providing that it is present—not past—membership which disqualifies (opinion of Court of Appeals, 301 N. Y. at p. 494, R. 67). Insofar as inquiry might in a particular case be made as to a past affiliation, such affiliation could not, once severed, be *prima facie* evidence to be introduced against a teacher. The permitted evidence could be as to present membership only. The law *does* leave "room for a change of heart" (Mr. Justice Burton in *Garner* v. *Los Angeles Board*, 341 U. S. at p. 729).

Dated: January 8, 1952.

Respectfully submitted,

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